HOW TO MAKE IT WORK

A Report of the B.C. Human Rights Commission on Strengthening the Statutory Protection of Human Rights

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Human Rights Commission of British Columbia

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Prepared by Eleanor Wachtel

PREFACE

When we were appointed Human Rights Commissioners in November 1981, we inherited from the outgoing Commission 31 Recommendations for Changes to the Human Rights Code. This was the culmination of the previous Commission's work during its term of office. The B.C. Code is almost a decade old. Innovative legislation of this kind inevitably requires updating and fine-tuning. Thus, for example, the Ontario, Quebec, and federal Human Rights Acts have all been rather extensively amended recently—to include new areas of protection and refine the administration and workings of the codes. Manitoba too has just initiated plans to modify its code.

With little hesitation and indeed with considerable commitment, we endorsed the principles of the Recommendations for Changes to the Human Rights Code of B.C. To underline that commitment, and further measure the climate of concern among the province's citizenry, we also undertook a series of local, open hearings in 1982. (There were 8 hearings in all: Victoria—March 29; Port Alberni—March 30; Nelson—May 17; Kelowna—May 18; Farmworkers in Vancouver—May 21; Prince George—May 25; Williams Lake—May 26; Vancouver—June 17 & 18.)

It would hardly be an exaggeration to say that we were shaken and surprised by the degree of frustration and anger we encountered. In failing to act on the previous Commission's recommendations, and allowing more than three months to elapse before naming new Commissioners, the government seemed to many to be signalling their indifference. Some people were openly suspicious that the Commission hearings were simply a means of diffusing concern or merely a sop to reformist groups.

It will soon be two years since those original recommendations—themselves based on hearings and lengthy deliberations—were put forward. To date, there has been no official positive reaction from government to indicate a move towards implementation. Groups pressed us for action; to heed the recommendations of the government-appointed committee for the International Year of the Disabled, for example, and to amend the Code in response to the recommendations of the previous Commission.

Another source of concern we felt in the hearings was the extent to which they called forth heartfelt articulation of suffering in areas that neither the Recommendations nor the Human Rights Code currently address. Clearly, there are all too few forums where people from the various regions of the province can get a hearing and which welcome the airing of problems. No one interested in human rights, in the rights of people to live in dignity and with equal opportunity in Canadian society, can afford not to hear.

Thus, the plight of farmworkers compelled our attention from the very first month of our appointment. We were aware that existing provisions didn't enable the Human Rights Branch to respond to complaints from the farmworkers with respect to perceived discrimination created by other legislation, but we were firmly convinced that there was a connection. It is arguably no coincidence that farmwork is an occupation practised almost exclusively by ethnic minorities. So that they could present their case, we decided to conduct a special day-long hearing devoted

exclusively to their predicament. More than 30 briefs were presented. Similarly, we recognized the structurally disadvantaged situation of domestic workers, which is a long-standing, neglected area of concern. In addition, we sought to give priority to Native Indian rights by establishing a permanent Native Indian Advisory Committee.

The Commission also anticipates a whole set of new wrinkles introduced in anticipation of the as yet infant document, the federal Charter of Rights and Freedoms—in particular, the equality provisions found in Section 15 which will take effect in April 1985. Its role and implications for human rights codes had also to be addressed.

This three-part report is both a record of findings from hearing testimony and briefs, and a measure of our commitment to change. We have drawn on our own experience and expertise in the field of human rights, as well as on the documentation put before us. The first report recounts the situation of farmworkers and domestic workers; the second delineates new areas for expanding human rights protection; and the third takes up administrative aspects and the strengthening of existing coverage. Our purpose is to be a catalyst for action. The Human Rights Commission endorses quick implementation of the Recommendations for Changes to the Code. The credibility of the Commission, of this province's dedication to human rights, and most important, the very quality of life in British Columbia are at stake.

Charles Paris (Chairperson)

Gloria George

Bijou Kartha

Renate Shearer

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AN AFFIRMATIVE PRINCIPLE

> The Canadian Association for the Mentally Retarded argued that anti-discrimination clauses in charters and human rights codes contain statements of conduct that is prohibited. The words are negative . . . . The Association favored a statement of positive rights. The argument which they advanced, to which we subscribe, is that those values contained in the various United Nations declarations should and could be stated as basic conditions of social, economic and cultural rights in Canada.
>
> —Capital Region Association for the Mentally Handicapped

A number of groups expressed their dismay at the "negative tone" of the B.C. Human Rights Code. Essentially a piece of anti-discrimination legislation, it was viewed as inadequate in affirming the *rights* of citizens, and thus was not in keeping with our international commitments. To that end, we propose the inclusion of the following Preamble:

> WHEREAS recognition of the inherent dignity and the equal inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS in recognition that the principles embodied in the Universal Declaration of Human Rights are a common standard for achievement by all peoples and all nations, it is public policy in British Columbia that every person is free and equal in dignity and rights;

AND WHEREAS it is the aim of this public policy to create amongst the residents of this Province at the community level a climate of understanding and mutual respect in which all our people will be made to feel that all are equal in dignity and rights, that each is a part of the whole Canadian community, and that each has a rich contribution to make to the development and well-being of our Province and Nation;

AND WHEREAS these principles have been confirmed in British Columbia by a number of enactments of the legislature;

AND WHEREAS it was found desirable in 1973 to enact the British Columbia Human Rights Code to codify such enactments and in subsequent years to extend them;

AND WHEREAS there is a necessity for this ACT to be revised from time to time to protect newly recognized human rights needs;

THEREFORE, Her Majesty by and with the advice and consent of the legislative assembly of British Columbia enacts as follows:

[Here begins the Human Rights Code.]

THE HUMAN RIGHTS CODE AND THE CHARTER OF RIGHTS & FREEDOMS

The new federal Charter of Rights and Freedoms (in particular the equality provisions found in Section 15 which will take effect in April 1985) has raised a number of questions in relation to human rights statues.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Does the new Constitution make provincial human rights legislation redundant? What is the relationship between the two? Will the increased awareness of human rights redress enhance the role of the provincial Commission? Although the Charter is still relatively untested, a number of legal experts have formulated opinions regarding its place in the human rights constellation.

Public Versus Private Relations

A primary distinction between the Charter and human rights codes is the different range of relationships they govern. Essentially, the Charter of Rights and Freedoms articulates the limits of government action. The Charter states that people are entitled to the equal protection of law; that is, the law itself can't be used to discriminate against them. The government can't legitimately enact statutes that are discriminatory. Thus, the Charter affects the relationship between people and government, not people and people, as human rights legislation does.

> The Charter has no effect on the raison d'etre for human rights Codes and Commissions. Their primary area of operation, namely the relationships between individuals, is maintained.
>
> —James MacPherson, "The Charter of Rights: Its Impact on Human Rights Commissions", June 1982

In a speech prepared for the 1982 annual meeting of the Canadian Association of Statutory Human Rights Agencies, the Honourable Jean Chrétien remarked that "the Charter is not intended to apply to inconsistent actions [inconsistent with the provisions of the Charter] by individuals, as opposed to governments or legislatures....I think the Charter will enhance the role of Human Rights Commissions."

> First, the Charter will undoubtedly raise the profile of human rights issues generally. This should affect the role of Human Rights Commissions which are identifiable actors in the human rights arena. Although the provisions in the Charter do not increase the jurisdictions of Commissions, I expect that the mere existence of the Charter will increase public awareness of human rights issues and that this in turn will have a spillover effect on the visibility and workload of Commissions.
>
> —James MacPherson, *ibid.*

Limited Protection

If the protection of the Charter, apparently, is limited to those areas in which government impinges on the citizen, even this circumscribed guarantee of equal protection of the law is not absolute. There are two provisos. First, the Charter states that the rights set out in it are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". And more pertinent here, Section 33 is a *non obstante* provision, which means that all the provincial legislatures and Parliament can specify that their laws shall operate "notwithstanding the Canadian Charter of Rights and Freedoms". This clause has been a source of uneasiness to virtually every group that sought the protection of the Charter.

> Section 33 was born of political expediency and places a particularly heavy burden upon provincial Human Rights Commissions. With respect, the presence of that section in the Canadian Charter of Rights and Freedoms calls upon this Commission to be the watchdog of the rights and freedoms of each and every citizen of the Province.
>
> —Capital Region Association for the Mentally Handicapped

The Canadian Association for the Mentally Retarded believes that the effect of "the inclusion of such a mechanism for by-passing rights is to entrench in the constitution a symbol of our country's unwillingness to commit itself to

deal fairly with those Canadians who have been least able to defend their rights." The Capital Region Association for the Mentally Handicapped called upon the Human Rights Commission to ensure that Section 33 is never implemented in B.C., and, further, to work towards its repeal from the Charter altogether.

Redress through the Courts

Even if Section 33 is not invoked, what redress is provided by the Charter?

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> —Section 24

This means that in some instances, a person may choose either to make a complaint through a Human Rights Commission or to launch an action directly in court. The constraints involved in the latter course are as follows:

- The adversarial framework of the courts is essentially contrary to the conciliation model of human rights agencies which seek to change behaviour rather than to punish offenders. You can't conciliate and prosecute at the same time.
- Expense. Unless the complainant is successful and is awarded costs, and even then, at least initially, all the legal costs would have to be borne by an aggrieved person rather than by the Human Rights Branch. Since thousands of dollars are required to pursue an action through the courts, expense can also work to limit access to the remedy of the Charter to all but the affluent.
- Burden of Proof. It may still be too early to speculate, but in general the burden of proof required in a judicial action may be more exacting than that necessary for effective negotiations that are often pursued in Human Rights resolutions.
- Judicial Conservatism. Traditionally, Canadian courts have been inhospitable to a human rights or civil liberties reading of the law. They have been very reluctant to fashion a creative jurisprudence around such rights and liberties. "As an essentially conservative elite, judges may use their additional powers under the Charter to protect status quo interests against those of disadvantaged people" (Alan Borovoy, *The Canadian Forum*).

The Chief Commissioner of the Canadian Human Rights Commission, Gordon Fairweather, has referred to the enhanced advocacy role of Human Rights Commissions—"we're missionaries"—in the face of law that is inherently conservative and a judiciary that reflects that. Some of the interpretations of the 1960 Bill of Rights, for example, have been described as "grotesque".

> There is certainly no evidence thus far that any of our courts, and certainly not the Supreme Court of Canada, are declaring legislation inoperative because of excessive zeal to protect our civil liberties against the legislators and administrators of Canada. Rather, it is suggested that as long as the Supreme Court of Canada continues in its cautious tradition, the fear is not that the judiciary will supplant the legislators as policy-makers in the field of civil liberties, but rather that they will abdicate the responsibility

for protecting civil liberties which is contemplated in the proposed Charter.

—Walter Tarnopolsky,
"The New Charter of Rights
and Freedoms: An Overview"

The Commission is more hopeful, but still does not feel that the judiciary should be placed in the position of chief protector of human rights. We are committed to involving ourselves in a provincial review of existing legislation to discern those areas that conflict with the Charter; thus far, we have been denied the opportunity. Further, we will monitor legislation, particularly in relation to Section 33.

RACIAL DISCRIMINATION

By and large, Canada is a country of immigrants. The numbers and types have fluctuated and varied over the years, but a common factor has been the desire, as articulated in the Canadian Human Rights Act, to have "an equal opportunity with other individuals to make for himself or herself a life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices." The length of time that we or our families have been here neither detracts from this desire, nor does it embellish it with privilege.

The first two major immigrant groups, the French and the English, came to regard themselves as the founding or charter groups; subsequent arrivals came to be regarded as "minorities". In addition, in every province, one or other of the "French" or "English" also constitute a minority. In such a situation, minority relations have been critical. "The history of minorities," the Honourable Mr. Justice Thomas R. Berger has said, "is the history of Canada too" ("Towards the Regime of Tolerance", An Address at the Human Rights and Cultural Mosaic of Canada Conference, April 1982). Justice Berger emphasized that "the history of the victories and defeats of minorities in Canada is the history of the successes and failures of those institutions which express the will of Canada's majorities." In other words, how we, through our legislation, treat our minorities, or allow them to be treated, is a measure of our national worth.

1983 marks the end of the U.N. Decade for Action to Combat Racism and Racial Discrimination. A large number of groups appeared before the Commission to present their assessment that we, as a province, have not been very successful in this undertaking. John D. McAlpine, in his *Report Arising out of the Activities of the Ku Klux Klan in B.C.*, concurs: "As a result of my review, it

is clear to me that the commitment made by the government of this province, as by the federal government, to implement the United Nations Covenants, remains to a substantial extent undischarged."

> States condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form and . . . (a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin . . . ; (b) shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.
>
> —The International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 4

The McAlpine Report documents a variety of racially motivated violence.

- On November 22, 1980, Nigerian students attending B.C.I.T. on an exchange program were the targets of vandalism with clear racial overtones . . . .
- On January 3, 1981, the home of Gurdev Singh Sidhu, located in Delta, was the target of firebombing when a lighted five-gallon container of gasoline was tossed through a window.
- On February 11, 1981, in Ladner, four Molotov cocktails were thrown at the home of sawmill worker Kuldip Gill . . . .
- On April 11, 1981, Hillel House at The University of British Columbia was spray-painted with the words: "KKK forever"; "Death of Jews"; "Death to Hillel House and all Jews . . . ." On the same night, the bus of the Jewish Community Centre and Chabbad Centre was broken into and a fire started on the front seats.

A Need for Re-education

Part of the responsibility for the continuance of racist behaviour was placed on the Commission, particularly in the areas of education, and affirmative action and employment.

> We do not feel that the potential of the commission has in the past years been fully recognized. In part, this failure was the result of a refusal to recognize that racism permeates every aspect of our society, has for many years done so, and, if left unchecked, will continue to bedevil this province . . . .
>
> Over the past few years, the British Columbia Teachers' Federation has stated its position in working for a school system which provides equal opportunities for individuals from all segments of our population to reap maximum benefits from our schools.
>
> —Pamela Webber, Committee on Racism in Schools, B.C.T.F.

It has been pointed out that, along with the increasingly

overt dissemination of "hate literature" of the Ku Klux Klan variety, there is the covert racism found even in school textbooks. This operates either through omission (a particular group seems to have made no positive contribution worth noting) or through expression of ethnocentric stereotypes. Briefs call for counter-action.

> The Commission should work together with the Ministry of Education to conduct a study of textbooks and other reading materials to identify and eliminate negative stereotyping of and racist attitudes towards minority groups. . . .
>
> Concurrent with the screening of reading materials, courses on human rights and multiculturalism should be taught. Such courses should be developed in the school curriculum to help the students to become aware of the issues of human rights and to develop respect and positive attitudes to those who are different from themselves. . . .
>
> On the other hand, educational programs should be directed toward teachers and other professional workers providing public services. . . .
>
> Finally, education should be directed towards the general public. . . .
>
> —United Chinese Community Enrichment Services Society (SUCCESS)

The United Nations Declaration on Race and Racial Prejudice (1978: Article 6, Subsection 3) underlines this aspect of anti-discrimination responsibilities.

> Since laws proscribing racial discrimination are not in themselves sufficient, it is also incumbent on states to supplement them by administrative machinery for the systematic investigation of instances of racial discrimination, and by programs as positive political, social, educational and cultural measures calculated to promote genuine mutual respect among groups. . . .

Finally, the McAlpine Report also concluded that education must be a crucial component in any anti-racism strategy.

> No one could deny that steps must be taken now to anticipate and ensure that race relations in this province do not deteriorate further. The most apparent area for change is in the field of education, not only in our school systems, but among the public at large, and within such institutions as law enforcement and government agencies. What is required now—indeed is expected by the members of the public who made representations to me—is a commitment by the government to act.
>
> —*The McAlpine Report*

Integration Services to Teach New Canadians Their Rights

Public education is one side of a solution. Many groups also spoke to the complementary role of seeking to integrate immigrants into our society as quickly and humanely as possible. This involves giving them the language skills and orientation services to take a full part in Canadian life. During the sometimes lengthy adjustment and learning period, New Canadians, particularly those not fluent in English, need to be helped to gain access to information, services and opportunities through bilingual multicultural workers. This need was documented by several groups, including the Inter-Cultural Association of Greater Victoria (an umbrella organization of over 30 ethnocultural groups) and SUCCESS. In Kelowna, the coordinator for immigrant services for the Social Planning

Council in Vernon spoke to the Commission:

> Language is a tool for communication, a part of a culture and a key to learning. Without the opportunity to learn our official languages, new immigrants are deprived of their rights as Canadian citizens. They may have difficulties understanding our political and legal systems and may not know the protections they are entitled to under the law. They are most vulnerable to exploitation by unethical employers, landlords, businessmen and even professionals. Their handicap in the language of our main culture isolates them furthermore from socializing with other Canadians and, consequently, reinforces stereotyping and discrimination against them . . . . Our government has good intentions in bringing in immigrants to fulfill our labour market needs and our obligations to humanity. However, it is inhuman to subject people to struggle for survival in a foreign country. It is the government's responsibility to assist immigrants to adapt and resettle in our country within a reasonable period.
>
> —Agnes Chung

Although responsibility for English as a Second Language courses and immigrant assistance programs does not fall directly under the Commission's purview, we take seriously the position taken by presenters who characterize denial of such services as a form of *de facto* discrimination or racism by omission.

Equal Opportunities in Employment

It is recognized that in times of high unemployment and economic hardship, visible minorities are particularly

vulnerable to subtle forms of discrimination. Further, recession creates a climate which is generally inhospitable to programs which would guarantee genuine equality of opportunity.

> In these times of economic restraint all too often the immigrant becomes the scapegoat for our economic ills.
>
> *Recommendation*: That the Human Rights commission undertake more research to look at the positive aspects of immigration and public education in the contribution that immigrants make to the economy and society . . . . The real fear of job competition is an issue that needs responding to. The short term dependency of immigrants is vastly offset by the long-term contributions they make.
>
> —The Inter-Cultural Association of Greater Victoria

> I am sure some will argue that it is rather inopportune for us to talk about Equal Opportunity in Employment at a time of very high unemployment and trade recession. This is exactly where we have very strong views. We maintain that, even when our economy experienced a boom, the Native Indians and the minorities, especially visible minorities, experienced real hardship in finding suitable employment . . . .
>
> We therefore feel that we do need some changes in our legislation and we will also request the Commission to institute a number of educational and remedial projects in our society with a view to create an environment conducive to the implementation of the policy of Equal Opportunity in Employment.
>
> —The Committee for Racial Justice

The Non-Immigrants: Canada's Native Indians

A number of Native Indian groups addressed the Commission, particularly when we travelled around the province outside the Lower Mainland. Their concerns were expressed succinctly as follows:

> Everyone knows that the Aboriginal people of B.C. have been brushed aside to make room for the white society. Every Indian personally experiences prejudicial treatment. It is a fact of Indian life. Indians are discriminated against in housing, jobs, and through differential law enforcement. Indian youths are gently ignored, not given a chance at employment, because Indians are stereotyped as lazy and drunkards.
>
> It is not only difficult, but in fact impossible to fight all these injustices legally, using the Human Rights Code every time an offense occurs. Prejudice is so subtle and persuasive. It starts before schooling, is carried out by well-meaning teachers, and continues through the paternalistic Indian Affairs Branch of the federal government.
>
> All the while, by pointing out that Indians are a federal responsibility, the provincial government conveniently ignores the massive Indian problem and through various actions makes it worse . . . .
>
> —McLeod Lake Indian Band

The B.C. Human Rights Commission regards as a priority the rights and needs of the Native Indians. To that end, the Native Advisory Committee has been working to formulate effective ways to address the issues.

Power under the Code

John McAlpine was commissioned to determine whether or not there was sufficient evidence against the Ku Klux Klan's activities in B.C. to warrant the appointment of a Board of Inquiry. His central finding was that "the Ku Klux Klan has not contravened the Human Rights Code, the reason being that the current provisions of the Code are framed too narrowly."

> It appears to me that what is required is the statutory protection of members of minorities from statements that constitute a serious affront to their dignity on the basis of race, religion and ethnic origin. The province has a constitutional base for creating a civil remedy for persons and groups of persons exposed to hatred, contempt or discrimination . . . . Protection may be afforded in the constitutional setting provided by the Human Rights Code. The administrative machinery is already in place. The Code, in addition to dealing as it does at present with proscribed areas of discrimination, could now, by amendment, proscribe those statements that promote and encourage discrimination.
>
> —*The McAlpine Report*

The changes he envisaged would require amendment to Section 2 of the Human Rights Code to expand and strengthen provisions: to prohibit the public display of any sign, notice, symbol, etc., which deprives, abridges or otherwise restricts the rights to which people are entitled under the Code; or which exposes to hatred, ridicules or otherwise affronts the dignity of people because of their race, religion, colour, etc.

> It is hoped that by enacting this legislation, a step will be taken toward a clear understanding of what is and what is not acceptable in society. It is hoped potential victims will have some

assurance that they enjoy rights under the law that protect them from the message of racism.
—*The McAlpine Report*

Recommendation

In March 1982, the Commission issued a "Position Paper on the Ku Klux Klan and Like Organizations" articulating many of the issues raised here. Here, we recommend a specific amendment to the Code that would adopt language similar to that found in the Saskatchewan Human Rights Code to strengthen Section 2 of the B.C. Code.

20.) No person shall publish, or display before the public, or cause to be published or displayed before the public, any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against a person or class of persons in any manner prohibited by this Act; or which has the effect, or is likely to have the effect of depriving, abridging or otherwise restricting the enjoyment by any person, or class of persons of any right to which he/she is or they are entitled under this Act; or which exposes, or tends to expose to hatred, ridicules, belittles, or otherwise affronts the dignity of any person, any class of persons or group of persons because of his/her or their race, religion, colour, sex, marital status, age, ancestry, place of origin or physical or mental condition.

ADMINISTRATION: THE UNGLAMOROUS SIDE OF HUMAN RIGHTS

All of the recommendations previously discussed will be of no value unless there is adequate enforcement of the Human Rights Code. In part, effective enforcement depends on a budget that allows for an adequate number of staff and provides the resources necessary to make the staff fully effective. . . . But the organization of the enforcement agency and a proper allocation of responsibilities is also crucial to effective enforcement, and we believe that legislative reform is needed regarding those matters.
—B.C. Civil Liberties Association

Behind every effective human rights code must be a structure and organization that functions well. Without it, all the best reforms in the world prove hollow.

What Commissions actually do is at least as important as the language of their parent statutes. From the perspective of administrative law it is, of course, essential to understand the words of the empowering statute. But words alone are not enough. One has to listen for the music. My point is that Commissions are not just law enforcement and educational agencies, with varying degrees of regulatory authority. We are actually law makers and we should not be shy about recognizing this reality.
—Ken Norman, Chief Commissioner, Saskatchewan Human Rights Commission, June 1982

Many groups reproached the Commission for structural flaws. In response, we wish to address a number of key

areas: (i.) number of Commissioners; (ii.) length of term; (iii.) status and organization; and (iv.) primacy of the Code.

Commission Size and Term of Office

From January 1, 1980 until August 31, 1980, there were 12 Commissioners. From August 31 to December, 1980, there were 6 Commissioners. Five of those six continued in office until August, 1981. The current Commission, appointed at the end of 1981, is composed of four members. One of these served previously; her term expires in July, 1983. The remaining three terms end in November, 1983.

Thus, the size of the Commission has fluctuated greatly and its system of operation through standing committees has varied as well. We believe that the Commission should be composed of from six to eight members, and that each Commissioner should be appointed for a term of office of four to five years. This would facilitate the working of committees, and a functional core would be assured by overlapping terms. The appointments should be staggered so as to ensure continuity and uninterrupted service and commitment. We believe the advantages of this are obvious.

Commission Independence

> The administration of human rights codes may need to be insulated from the daily ebb and flow of popular opinion. Such opinions are reflected by the executive arm of government and the daily application of existing human rights legislation to specific cases needs considerable independence from the executive like the judge needs independence from government to produce justice.
>
> —Dr. Karl Friedmann,
> Ombudsman, B.C., June 1982

At the 1982 annual meeting of the Canadian Association of Statutory Human Rights Agencies, the following resolution concerning the independence of statutory human rights agencies was adopted:

> BE IT RESOLVED that the Canadian Association of Statutory Human Rights Agencies calls upon the Parliament of Canada and the Legislative Assemblies of Provinces to insure the independence of statutory human rights agencies by:
> 1.) Separating such agencies from departments of government;
> 2.) Appointing commissioners for fixed terms, of not less than three years, during good behaviour, subject to removal only by Parliament or the Legislature;
> 3.) Reporting to Parliament and Legislatures through their respective Speakers rather than through a Minister of the government.

Currently, the federal Human Rights Commission is appointed for a term of seven years and is removable only by the Governer in Council on address of the Senate and the House of Commons. "The security and independence provided for...is indispensable if there is to be full confidence that Human Rights Commissions will enforce their codes as vigorously against their own governments as against the private sector" (Walter Tarnopolsky, "The Role and Function of Government Commissions for the Protection and Promotion of Human Rights," Oct. 1982).

> It is important that the B.C. Human Rights Commission to be an independent body that can fairly evaluate the rights of all persons.... At present, the Commission is appointed by the Lieutenant Governor in Council—in effect, by Cabinet. That means of appointment has created

fear at various times that the Commission was biased in one direction or another. Whether or not such fear has been justified, it has undermined the effectiveness of the Commission.

It is essential that the Commission be appointed in a manner that is perceived as fair both by members of disadvantaged groups and by employers, trade unions, landlords and businesses serving the public. Therefore, WE RECOMMEND that the Commission be appointed in a manner similar to the procedure for appointing the Ombudsman. Section 2 of the Ombudsman Act provides that the choice shall be made by unanimous recommendation of a special committee of the Legislative Assembly. The actual appointment is made by the Lieutenant Governor. This process would help ensure that members of the Commission had the respect of all segments of society. It would also emphasize the importance of the Human Rights Code and of the duties of the Commission.

—B.C. Civil Liberties Association

The Commission wholeheartedly *concurs* with this recommendation. We feel that an open, public appointment of Commissioners will ensure a more representative and credible body.

Complaint Procedures

The usual procedure at the Human Rights Branch (the administrative body which actually handles cases) involves the following steps in processing a complaint.

1.) Intake. At this point, it is determined whether the complaint falls under the jurisdiction of the B.C. Code.
2.) Investigation.

3.) Conciliation. Human rights legislation is unique in that its primary goal is conciliation rather than adversarial prosecution. HUMAN RIGHTS MEANS SOMETIMES HAVING TO SAY YOU'RE SORRY. This is a much more effective tool when the purpose is to modify behaviour rather than punish perpetrators.
4.) Case Settled or Referred to Minister. At this point, either the case is settled and thus closed, or if unresolved, it is referred to the Minister who *may* appoint a board of inquiry which would then rule on the case and reach a decision (which may further be appealed through the courts), or he/she *may not* appoint a board of inquiry.

At present, the Minister decides whether or not to appoint a Board of Inquiry. It appears that the decision is entirely discretionary. That arrangement is completely unsatisfactory. The decision to appoint a Board of Inquiry should be made by an independent and impartial tribunal which has no other responsibilities that may create a conflict of interest. A person holding the position of Minister of Labour does not fit these criteria. The Minister is a member of Cabinet and in that capacity shares responsibility for the administration of the public service, the largest employer in the province, and for all programs approved by the Cabinet. He is also in charge of a Ministry that offers a number of services to the public. Thus, the Minister cannot be considered an independent and impartial tribunal with respect to complaints against the government.

—B.C. Civil Liberties Association

In 1981, the Human Rights Branch received over 9,000

inquiries regarding possible allegations of discrimination. This was a 50% increase over 1980. The actual number of complaints handled was 881, of which more than a third were carried over from 1980. Nine complaints were referred to Boards of Inquiry; one was resolved prior to the Board's appointment, and another adjourned to allow for a possible settlement. Only seven cases, then, went to Boards of Inquiry in 1982. At the same time, 17 unsettled cases were referred to the Minister and *no Boards of Inquiry appointed*. Neither the reasons behind ministerial decisions nor the particulars of the cases are ordinarily made public. Thus, regardless of what sound grounds may exist for not appointing a Board of Inquiry, the fact remains that all the public can see is twice as many unsettled cases apparently being buried as brought to a hearing.

> Even if the complaint is against a private individual or company, the Minister may have conflicting responsibilities. The Minister is given responsiblity for promoting harmonious labour relations in the province, and the duty requires that he or she develop a harmonious relationship with both management and labour. Thus, a Minister may hesitate to approve a Board of Inquiry in a case against a large employer or trade union. Also, it may be feared that a Board of Inquiry would complicate negotiations between management and labour, and the Minister's reponsibilities for collective bargaining may create the temptation to sacrifice the rights of a minority in order to achieve labour peace. On one occasion, a Minister admitted that a Board of Inquiry had been denied, not because the case was weak or because the complaint fell outside the Human Rights Code, but because the Minister felt that the matter should be decided through the collective bargaining process.
>
> We do not suggest any bad faith on the part of any Minister, past or present. The problem is not that individuals holding the position of Minister have misused their power. Rather, it is that the Minister of Labour will unavoidably face conflicts of interest and is not the kind of impartial tribunal that should decide whether or not to appoint boards of inquiry.
>
> WE RECOMMEND that the Human Rights Commission be assigned the responsibility for deciding whether or not to appoint a Board of Inquiry. That is the process under the Canadian Human Rights Act. The Acts of Alberta and Saskatchewan allow the Commission to appoint a Board of Inquiry. In Manitoba and Ontario, the actual appointment is made by the Minister, but a Board must be appointed if the Commission so recommends. In Québec, enforcement is through the Courts, but again it is the Commission (with the consent of the complainant) that decides whether to proceed.
>
> —B.C. Civil Liberties Association

This, too, is a view with which the Commission concurs. At present, the Director of the Human Rights Branch must endeavour to settle all complaints. The Minister of Labour must decide between referring every unsettled case to a Board of Inquiry or denying an open hearing to a complainant. The Human Rights Commission can become involved in supporting a case as an intervener only if a Board of Inquiry is appointed by the Minister.

In all other Canadian jurisdictions the responsibility for such decisions rests with the Human Rights Commission.

The Commission Recommends:

30.) A single, integrated Human Rights Commission be established with authority and responsibility to inquire into and investigate complaints under the Code, and to make reviewable decisions, giving reasons, on their appropriate disposition. These powers would include power to dismiss a complaint if it is unfounded, power to approve a settlement if an appropriate remedy has been made, and power to refer an unsettled complaint to a Board of Inquiry for a public hearing.

The Commission Recommends:

To ensure that public funds are not wasted on allegations that are made maliciously or in bad faith, the Commission recommends:

31.) The Human Rights Commission be given power to dismiss complaints that are found to be "trivial, frivolous or vexatious", and power to require consent of the victim to investigate a third-party complaint.

Separation from the Ministry of Labour

To further ensure the independence of the Commission and the impartiality of the Minister of Labour, and all other Ministers for that matter, we recommend the removal of this newly integrated Human Rights Commission from the Ministry of Labour. The constraints and contradictions in having a Commission dependent on the resources of front line departmental staff throw into question the Commission's credibility. This is a forceful

case for justice not only being done, but *being seen to be done*.

> The members of the Commission's staff, from the Executive Director down, are subject to the control of the civil service hierarchy within the Ministry of Labour. How, then, are these staff members supposed to investigate discrimination complaints or initiate affirmative action programs involving their superiors in the . . . civil service and, indeed, in the Ministry of Labour itself? This arrangement creates a great risk that the Commission's staff will neither feel nor appear sufficiently free to use their available powers and pressures against their employment superiors . . . .
>
> Indeed, under the circumstances, the non-civil service Commission simply cannot have sufficient control over its civil service staff. Who is empowered to determine the techniques, restraints and priorities which the staff must observe? Their civil service superiors in the Ministry of Labour or their non-civil service superiors in the Human Rights Commission? What happens in the event of a conflict between these two?
>
> On the basis of all these considerations, we believe that the entire operation, Commissioners and staff, should be removed from any and all civil service direction and control. If it is deemed desirable for the Commission to continue reporting to the Legislature through a Cabinet Minister, this could be done on the basis of a direct relationship between the Commission and the appropriate Minister, without any civil service intermediaries.
>
> —Canadian Civil Liberties Association

This is consistent with the CASHRA recommendation; it is currently operative in Québec, for example, and it is a position we fully endorse.

Primacy

Again, in order for human rights legislation to have an effective impact and in order to avoid being hamstrung by legalistic loopholes, the Human Rights Code must have paramountcy over other statutes. The recent decision by the Supreme Court of Canada in the matter of the Insurance Corporation of British Columbia versus Robert Heerspink and the Director, Human Rights Code, includes a minority opinion by Justice Lamer which supports this view. "Indeed the *Human Rights Code*, when in conflict with 'particular and specific legislation', is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law."

Anything less would entail wasteful and regressive litigation.

The Commission Recommends:

26.) Generally, the Human Rights Code should supersede other legislation where there is a conflict between the Code and other legislation.

LIST OF RECOMMENDATIONS CONTAINED IN ALL THREE MINI-REPORTS

The Commission Recommends:

Terminology

1.) That protection to disabled people be extended through the use of the clause "no person shall discriminate against any person because of the *physical or mental* condition of that person".

2.) That physical or mental condition include a condition limiting or perceived or believed to limit the performance of normal activities by a person who is or is believed or perceived to be suffering significantly and permanently from a physical or mental limitation, disability, infirmity, malformation, or disfigurement.

Without limiting the generality of the foregoing, physical or mental condition includes epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other reme-

dial appliance or device; mental retardation or impairment; a learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language or a mental disorder.

Denial of Accommodation, Service, or Facility

3.) That the protection given to disabled people by Section 3 be more clearly set out to say that no person shall unreasonably deny public facilities, accommodation, or service to any person or class of persons because of physical or mental condition.

Purchase and Lease of Property

4.) That disabled people be included in Sections 4 and 5 of the Code so that no person shall unreasonably deny to any person the opportunity to purchase or lease land because of physical or mental condition of that person.

Employment Advertising

5.) That disabled people be included in Section 7a of the Code so that no employer can express an intention to discriminate in any way because of a physical or mental condition.

Requesting Information on Application Forms

6.) That disabled people be included in Section 7b so that no employer can ask

or During an Interview

questions on an application about a physical or mental condition unrelated to the skills and ability to perform the work available, or refuse an interview to a person only on the basis of information relating to that physical or mental condition.

Employment

7.) That the protection extended to disabled people by Section 8 be clearly set out to say that no person shall be refused employment or advancement or be discriminated against in respect of employment or a condition of employment, or be refused a referral for employment because of a physical or mental condition unless that condition materially affects the quantity or quality of production by the employee or applicant and the decrease in productivity cannot be accounted for by an adjustment of salary.

Trade Union and Occupational Associations

8.) That the protection extended to disabled people by Section 9 be clearly set out and state that no person can be refused membership in a trade union, employer's association, or occupational

association because of an unrelated physical or mental condition.

9.) That architectural standards continue to be dealt with in the Provincial Building Code to ensure access to public buildings, rental accommodation equipped with elevators, and all work places where wheelchair access for the disabled can be constructed at a reasonable cost.

10.) That all people, regardless of sexual orientation, should be protected by all sections of the Human Rights Code.

11.) That protection to homosexuals and lesbians be extended through use of the clause (no person shall be discriminated against on the basis of) "sexual orientation".

12.) That sections 3, 8 and 9, dealing with acts of discrimination in public facilities, accommodation or services, employment and membership in trade unions or occupational associations be enlarged so as to specifically name sexual orientation as a prohibitive basis for discrimination.

13.) That homosexuals and lesbians be given the protection of sections 4, 5 and 7 of the Code so that no person shall deny any person the right to purchase property, or lease property, because of a person's sexual orientation, so that no employer can advertise an intention to refuse employment to a person because of sexual orientation, and so that a person cannot be asked questions about their sexual orientation in a job interview.

14.) The concept of "equal pay for work of equal value" for men and women workers be incorporated into the Human Rights Code with "equal value" to be determined by the composite of skills, effort, responsibility and working conditions.

15.) That protection against sexual harassment be made explicit in the Human Rights Code.

16.) That the definition of age in Section 1 of the Human Rights Code be changed to eliminate the upper age limit and set as the lower age limit the age of majority.

17.) That Sections 8 (3) (employment) and 9 (3) (trade unions and occupational associations) of the Code be amended so that the operation of any terms or conditions in a retirement, superannuation or pension plan will not require the retirement of any employee because of that employee's age.

18.) That while an employer may retain a standard age at which employees may retire at full pension, nothing should preclude employees from continuing work if they wish to do so. However, if people continue to work beyond age 65, they could legitimately be excluded from participating in the pension plan (i.e., they would no longer contribute or earn pension credits, but/and would not draw pension until they stopped working).

19.) That where any other provincial statute requires retirement at a specified age, the Human Rights Code shall take precedence.

20.) No person shall publish, or display before the public, or cause to be published or displayed before the public, any notice,

sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against a person or class of persons or group of persons in any manner prohibited by this Act; or which has the effect, or is likely to have the effect of depriving, abridging or otherwise restricting the enjoyment by any person, or class of persons of any right to which he/she is or they are entitled under this Act; or which exposes, or tends to expose to hatred, ridicules, belittles, or otherwise affronts the dignity of any person, any class of persons or group of persons because of his/her or their race, religion, colour, sex, marital status, age, ancestry, place of origin or physical or mental condition.

21.) That section 3 (public facilities, accommodation or service), 5 (leasing of property), and 8 (employment) of the Human Rights Code be amended to prohibit discrimination on the basis of family status.

22.) That section 5 of the Code (leasing of property) be amended to provide that no person shall be denied tenancy because of age, family composition or source of income.

23.) That age be defined as including anyone over the age of majority, but that provision be made so that special accommodation such as accommodation for senior citizens, university students, the disabled, etc., are exempted.

24.) That family composition be defined as meaning whether both parents, or one parent, or children are included in the

family unit.

25.) That section 7 of the Code (7a: employment advertising; 7b: requesting information on application forms or at job interviews) be expanded to prohibit inquiries into marital status, family composition, sex, age or irrelevant criminal conviction.

26.) Generally, the Human Rights Code should supersede other legislation where there is a conflict between the Code and other legislation.

27.) That consideration be given to expanding Section 4 and 5 to prohibit discrimination without reasonable cause in the rental or purchase of property.

28.) That the Human Rights Commission be given power to issue guidelines, binding upon Boards of Inquiry, specifically describing the conduct that constitutes discrimination prohibited by the Code.

29.) A single, integrated Human Rights Commission be established with authority and responsibility to inquire into and investigate complaints under the Code, and to make reviewable decisions, giving reasons, on their appropriate disposition. These powers would include power to dismiss a complaint if it is unfounded, power to approve a settlement if an appropriate remedy has been made, and power to refer an unsettled complaint to a Board of Inquiry for a public hearing.

30.) The Human Rights Commission be given power to dismiss complaints that are found to be "trivial, frivolous or vexatious", and power to require consent of the victim to investigate a third-party complaint.

ADDITIONAL RECOMMENDATIONS

I. Recommendations with Respect to Farmworkers

The B.C. Human Rights Commission fully endorses the following recommendations:

1.) All exclusions and exceptions of farmworkers currently in place under the Employment Standards Act be removed, allowing farmworkers to enjoy the same protection as all other workers (from the brief presented by the Canadian Farmworkers' Union);
2.) That the Industrial Camp Regulations be implemented and applied immediately (Canadian Farmworkers' Union);
3.) Laws should be enacted to guarantee that all Canadian farmworkers have adequate showers, change rooms and laundry facilities. Also, protective clothing and equipment should be required where necessary (from the brief presented by the Fraser Valley Farmworkers Legal Services Project).

Further with regard to protection of farmworkers from pesticides, we fully endorse the *recommendations* made by the B.C. Medical Association (Environmental Health Committee) to the Workers' Compensation Board of B.C. (October 1982). These are:

1.) Laws should be enacted to guarantee that Canadian farmworkers have adequate protective facilities as specified by the Workers' Compensation Board.
2.) Specific standards should be legislated to govern the specifications, maintenance

and inspection of pesticide equipment.
3.) The Workers' Compensation Board should undertake to ensure that pesticide applicators and users on farms under W.C.B. jurisdiction are subject to the same certification provisions as those for applicators and users of pesticides on public lands.
4.) Farmworkers who enter fields after spraying should be given necessary safety information in a manner understood by them. Safety information should include the identification and hazards of chemicals being used and should be provided to the worker on information sheets. Applicators should ensure that adequate notice is given to high-risk individuals (e.g. pregnant women and young children) on the farm prior to spraying.
5.) The Workers' Compensation Board should urge the establishment of legislated minimum re-entry periods and mandatory posting of warning signs after application of certain pesticides. Warning signs should be placed in English and in a form understandable by the majority of workers. A comprehensive list of those pesticides should be drawn up by Health and Welfare Canada in co-operation with Environment Canada and the Federal Ministry of Agriculture.
6.) Pre-harvest entry periods should be established, based on residue dynamics, mode of action and the toxicity of each pesticide for both adults and children.
7.) Maximum exposure levels should be sought for all pesticides.
8.) The W.C.B. should review California's

provisions for emergency medical care and medical supervision of farmworkers and enact those provisions if they are appropriate to the conditions in B.C.

9.) The W.C.B.'s general provisions concerning first-aid standards should apply to farms based on size and other factors, as they have done for other industries, taking particular note of exposure to pesticides.

10.) Suspected cases of pesticide poisoning should be reportable to the W.C.B. and included as a separate category of accident in the accident statistics.

11.) The W.C.B. should be encouraged to undertake regular selective monitoring of the environment and work force to ensure compliance with the regulations. The W.C.B. should fund epidemiological studies of workers at risk, in co-operation with other jurisdictions, to avoid duplication of effort.

12.) To ensure the ability to conduct meaningful epidemiologic studies, the W.C.B. should require farm operators to keep records of all pesticide applications.

II. Recommendations with Respect to Domestic Workers

The Human Rights Commission fully endorses the following recommendations (contained in the CARDWO submission):

1.) Household workers should be covered by all provisions of the provincial Minimum Wage Act, including compensation for overtime worked. In situations where room and board are provided as partial

remuneration for labour performed, the amount charged for room and board should equal no more than one-third the total wage.

2.) Household workers should be covered by all provisions of the following provincial legislation: Hours of Work Act; Payment of Wages Act; Annual and General Holidays Act; Maternity Protection Act; Workers' Compensation Act; Truck Act; and the Control of Employment of Children Act.

3.) The Ministry of Labour should assign inspectors whose task it is to familiarize themselves with the conditions and situations of household workers and to enforce labour standards legislation with respect to these workers.

4.) The provincial Ministry of Labour should establish liaison with the federal Department of Employment and Immigration to ensure that:
   a) abuse of Employment Visa workers in B.C. does not occur;
   b) provincial labour standards legislation is enforced with respect to Employment Visa workers in the same manner as other workers.

5.) That domestic workers currently in Canada on employment visas and those entering Canada be granted landed immigrant status based on their ability to do the job and without discrimination based on race, country of origin, familial ties or amount of formal training.

III. The Commission Proposes the Inclusion of the Following Preamble:

WHEREAS recognition of the inherent dignity and the equal inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS in recognition that the principles embodied in the Universal Declaration of Human Rights are a common standard for achievement by all peoples and all nations, it is public policy in British Columbia that every person is free and equal in dignity and rights;

AND WHEREAS it is the aim of this public policy to create amongst the residents of this Province at the community level a climate of understanding and mutual respect in which all our people will be made to feel that all are equal in dignity and rights, that each is a part of the whole Canadian community, and that each has a rich contribution to make to the development and well-being of our Province and Nation;

AND WHEREAS these principles have been confirmed in British Columbia by a number of enactments of the legislature;

AND WHEREAS it was found desirable in 1973 to enact the British Columbia Human Rights Code to codify such enactments and in subsequent years to extend them;

AND WHEREAS there is a necessity for this ACT to be revised from time to time to protect newly recognized human rights needs;

THEREFORE, Her Majesty by and with the advice and consent of the legislative assembly of British Columbia enacts as follows:

[Here begins the Human Rights Code]

IV. Administrative Recommendations

1.) Manner of Appointment. WE RECOMMEND that the Commission be appointed in a manner similar to the procedure for appointing the ombudsman. Section 2 of the Ombudsman Act provides that the choice shall be made by unanimous recommendation of a special committee of the Legislative Assembly and approved by the Legislative Assembly. The actual appointment is made by the Lieutenant Governor. This process would help ensure that members of the Commission had the respect of all segments of society. It would also emphasize the importance of the Human Rights Code and of the duties of the Commission.

2.) Term of Office. The Commission should be composed of from six to eight members, and each Commissioner should be appointed for a term of office of four or five years.

3.) Separation from the Ministry of Labour. To further ensure the independence of the Commission and the impartiality of the Minister of Labour, and all other Ministers, for that matter, we recommend the removal

of the newly integrated Human Rights Commission from the Ministry of Labour. The constraints and contradictions in having a Commission dependent on the resources of front line departmental staff throw into question the Commission's credibility.